

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. G(P)14559-41B BY)	
FREDERICK L. JOHNSON)	

* * * * *

The Hearing Examiner's Proposal for Decision in this matter was entered on August 9, 1990. The Proposal recommended that the Application for Change of Appropriation Water Right No. G(P)14559-41B be granted with the following conditions:

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize Appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of the Change Authorization by the Department shall not reduce Appropriator's liability for damages caused by the exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

C. This Change Authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all water diverted, including the period of time, and shall submit said records upon demand and by November 30 of each year to the Helena Water Rights Field Office, 1520 E. 6th Avenue, Helena, MT 59620.

Objectors, East Bench Irrigation District and Clark Canyon Water Supply Company through Richard H. Kennedy, Manager, filed exceptions to the Proposal on August 22, 1990, but did not

request an opportunity for oral argument. Mr. Kennedy, in his exception, requested the Hearing Examiner to amend Condition C to require the water meter to be read by a Court Appointed Water Commissioner at the beginning of the irrigation season and at monthly intervals through the end of the irrigation season. The records would become a permanent part of the Water Commissioner's records on file at the Beaverhead County Courthouse with a copy sent to the Helena Water Resources Field Office upon demand and no later than November 30 of each year. He further requested that the meter would be equipped with a totalizer which would convert water flow into acre-feet and that Appropriator would be required to repair and/or replace the meter within a reasonable amount of time if the meter malfunctions.

The Department of Natural Resources and Conservation lacks authority to require a Court Appointed Water Commissioner to read the water meter. Moreover the Water Commissioner for Rattlesnake Creek is only authorized to measure and deliver surface water. No Commissioner has been appointed with authority to monitor groundwater. Consequently, the condition as proposed by Mr. Kennedy is not workable.

The Hearing Examiner met with both parties on August 29, 1990, to discuss the exceptions and the problems presented by Mr. Kennedy's proposal. The Applicant agreed to allow access to an employee of the Clark Canyon Water Supply Company to read the meter at monthly intervals. The Objector agreed that this access would resolve the exception. The Department acknowledges this

agreement and there being no further exceptions, makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. G(P)14559-41B by Frederick L. Johnson is hereby granted to change the place of use of 80 acres from E $\frac{1}{2}$ NW $\frac{1}{4}$ to the NW $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, in Beaverhead County, Montana, for irrigation purposes on 160 acres. The remaining acreage irrigated under Permit No. 14559-41B, 95 acres in the NE $\frac{1}{4}$ of said Section 33, will remain unchanged. The water shall be diverted at a rate not to exceed 1200 gpm up to 339.2 acre-feet per annum.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize Appropriator to divert water to the detriment of any senior appropriator.

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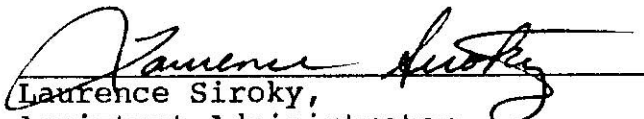
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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of September, 1990.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 19th day of September, 1990, as follows:

Frederick L. Johnson
Myers Star Rt.
Hysham, MT 59038

Ronald W. Johnson
Box 791
Dillon, MT 59725

East Bench Irrigation District
Clark Canyon Water Supply Co.
ATTN: Richard H. Kennedy, Mgr.
1100 Hwy 41
Dillon, MT 59725

Aileen O. Peterson
1325 Hwy 278
Dillon, MT 59725

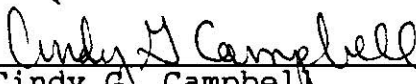
Carol & Thomas Peterson
John & Melissa Peterson
P.O. Box 127
Wilsall, MT 59086

T. J. Reynolds, Field Manager
Helena Water Resources Field Office
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Helena, MT 59624-1185

Tash T Diamond Livestock
William Tash, President
1200 Hwy 278
Dillon, MT 59725


Cindy G. Campbell
Hearings Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	PROPOSAL FOR DECISION
RIGHT NO. G(P)14559-41B BY)	
FREDERICK L. JOHNSON)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 1, 1990, in Dillon, Montana.

Applicant Frederick L. Johnson, appeared by and through Ronald W. Johnson and counsel, Cecil Jones.

Objectors East Bench Irrigation District and Clark Canyon Water Supply Co., hereafter East Bench, appeared by and through Richard H. Kennedy, Manager.

Objectors Aileen O. Peterson, Carol and Thomas D. Peterson, John R. and Melissa Peterson, and Tash T. Diamond Livestock, Inc. appeared by and through William T. Tash, hereafter, Objector Tash.

Jim Beck, Agricultural Engineer with the Helena Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

EXHIBITS

Applicant's Exhibit 1 is map depicting the N½ of Section 33, part of the S½ of Section 28, and a portion of the N½ of Section 32, all in Township 7 South, Range 9 West, in Beaverhead County.

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The NW $\frac{1}{4}$ of said Section 33 has been divided by a dashed line of red ink. The W $\frac{1}{2}$ NW $\frac{1}{4}$ is cross-hatched in green ink and represents acreage irrigated under Permit No. 22712-41B. The E $\frac{1}{2}$ NW $\frac{1}{4}$ is cross-hatched in purple ink and represents the acreage irrigated under Permit No. 14559-41B. This map also identifies the locations of the existing supply lines, and in red ink, the location of the manifold works and direction of the water flow. This Exhibit was received into the record without objection.

Objector East Bench's Exhibit 1 is a copy of U.S.G.S. Quadrangle map, Dillon West on one side of the paper. The locations of three wells are marked on the map with a square in red ink. The number 14559, in pencil, was placed on the map during the hearing by the Hearing Examiner to identify the well authorized by Permit No. 14559-41B, the water right involved in this Application for Change of Appropriation Water Right.

The other side of the paper is a line graph indicating the ground surface beginning at the Ron Johnson well and ending at the Beaverhead River and the static water level of three wells, the Ron Johnson well, the Fred Johnson well, and the Peterson well. By extending the static water level line, it appears the groundwater discharges into the Beaverhead River.

Applicant objected to this Exhibit becoming a part of the record because the person who made the graph was not present at the hearing, thus not available for questioning.

Mr. Kennedy argued the graph could be made by anyone using the information in a report written by Bill Uthman. Uthman's

report is dated May 16, 1990 and is in the Department file. On that basis, the objection was overruled and the Exhibit was accepted into the record.

Objector Tash offered no exhibits for inclusion in the record.

The Department file was reviewed by all parties and was accepted into the record without objection.

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter. Thus, the Department has jurisdiction.

2. This Application for Change of Appropriation Water Right was duly filed with the Department on March 16, 1990 at 10:44 a.m.

3. The pertinent portions of the Application were published in the Dillon Tribune Examiner on April 17, 1990.

4. The Applicant seeks to change the place of use for Water Use Permit No. 14559-41B. This Permit authorized the Permittee to irrigate 120 acres in the NE $\frac{1}{4}$ and 80 acres in the NW $\frac{1}{4}$, all in Section 33, Township 7 South, Range 9 West, Beaverhead County, Montana. The source of water for this appropriation is a well located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 33. (Department file.)

5. During the verification procedure, Jim Beck determined the actual acreage irrigated under this Permit was 95 acres in the NE $\frac{1}{4}$ and 80 acres in the NW $\frac{1}{4}$ of said Section 33 for a total of 175 irrigated acres, 25 acres less than the total acreage permitted. All irrigation was by wheel line sprinklers.

6. The Applicant also has Permit No. 22712-41B which has been used to irrigate 160 acres in the NW $\frac{1}{4}$ of Section 33 by wheel line sprinklers. The source of supply for this permit is Downing Springs.

7. There will be no physical change in the place of use. The Applicant proposes to irrigate all of the NW $\frac{1}{4}$ of said Section 33 with one center pivot with an end gun. The sources, a groundwater well and Downing Springs, will be diverted into a manifold system which will then carry the water in a single delivery line to the center pivot. By making this change, the water that had been previously used only on the E $\frac{1}{2}$ NW $\frac{1}{4}$ will now mingle with the water diverted under Permit No. 22712-41B and be used over the entire NW $\frac{1}{4}$. The remaining irrigation of the NE $\frac{1}{4}$ of Section 33 will not be changed. (Testimony of Applicant, Applicant's Exhibit 1, and Department file.)

8. There will be no change in the means of diversion; point of diversion; delivery line with the exception of the manifold works; flow rate, 1200 gpm, of water diverted; or volume, 339.2 acre-feet, of water diverted. (Testimony of Applicant.)

9. The Applicant has possessory interest in the place of use. (Department file.)

10. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved that may be adversely affected by this Application. (Department file and records.)

11. Mr. Kennedy on behalf of East Bench, stated this proposed change would not cause further adverse effect to their water rights. Both Kennedy and Objector Tash stated their objections were based on the cumulative effect the issuance of new permits has on the senior water rights.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties thereto. See Finding of Fact 1.

3. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-402(2), MCA, have been met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The use of water, irrigation, is a beneficial use. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriations works are adequate. See Findings of Fact 7 and 8.

6. The proposed change will not adversely affect any planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 10.

7. The Applicant has possessory interest in the proposed place of use. See Finding of Fact 9.

8. The proposed change will not adversely affect the water rights of other persons. See Findings of Fact 7, 8, and 11.

9. The proposed change, G(P)14559-41B, will be used in association with water appropriated under Permit No. 22712-41B and be commingled to operate a pivot irrigation system on 160 acres in the NW¼ of Section 33, Township 7 South, Range 9 West. No additional water will be appropriated. See Finding of Fact 7.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Change of Appropriation Water Right No. G(P)14559-41B by Frederick L. Johnson is hereby granted to change the place of use of 80 acres from E $\frac{1}{2}$ NW $\frac{1}{4}$ to the NW $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, in Beaverhead County, Montana, for irrigation purposes on 160 acres. The remaining acreage irrigated under Permit No. 14559-41B, 95 acres in the NE $\frac{1}{4}$ of said Section 33, will remain unchanged. The water shall be diverted at a rate not to exceed 1200 gpm up to 339.2 acre-feet per annum.

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record of the flow rate and volume of all water diverted, including the period of time, and shall submit said records upon demand and by November 30 of each year to the Helena Water Rights Field Office, 1520 E. 6th Avenue, Helena, MT 59620.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served on all parties within 20 days after service of the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of August, 1990.


Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, certified mail, return receipt requested, at their address or addresses this 9th day of August, 1990 as follows:

Frederick L. Johnson,
Myers Star Rt.
Hysham, MT 59038

Ronald W. Johnson
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Carol and Thomas D. Peterson &
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Aileen O. Peterson
1325 Hwy 278
Dillon, MT 59725

Tash T. Diamond Livestock,
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c/o William T. Tash, President
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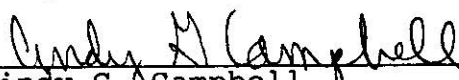
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